No. 83-96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO,
Petitioner,

v.

THE HOOVEN & ALLISON COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE STATE OF OHIO CAN IMPOSE ITS NONDISCRIMINATORY AD VALOREM PROPERTY TAX ON IMPORTED RAW MATERIALS NO LONGER IN TRANSIT WHICH ARE RETAINED IN THEIR ORIGINAL PACKAGES AND HELD FOR USE IN MANUFACTURE IN OHIO WITHIN THE STRICTURES OF THE IMPORT-EXPORT CLAUSE OF THE UNITED STATES CONSTITUTION, ART. I, § 10, cl. 2.

II. WHETHER THE DECISION OF THIS COURT IN *MICHELIN TIRE CORP. v. WAGES*, 423 U.S. 276 (1976), EFFECTED A CHANGE IN THE CONTROLLING LEGAL PRINCIPLES APPLICABLE TO A DETERMINATION OF WHETHER OHIO'S ASSESSMENT OF ITS AD VALOREM PROPERTY TAX AGAINST IMPORTED RAW MATERIALS VIOLATES THE IMPORT-EXPORT CLAUSE.

III. WHETHER SUBSEQUENT TO *MICHELIN* THE DECISION OF THIS COURT IN *HOOVEN & ALLISON CO. v. EVATT*, 324 U.S. 652 (1945), RETAINS ANY VITALITY REGARDING THE ABILITY OF THE STATES TO TAX IMPORTED RAW MATERIALS.

IV. WHETHER COLLATERAL ESTOPPEL MAY BE APPLIED WHEN IT WOULD RESULT IN ONE MANUFACTURER BEING PERPETUALLY IMMUNE FROM OHIO'S AD VALOREM PROPERTY TAX ON ITS IMPORTED RAW MATERIALS WHILE ALL OTHER BUSINESSES' IMPORTED GOODS, INCLUDING RAW MATERIALS, WOULD BE SUBJECT TO THAT TAX BECAUSE OF A SUBSEQUENT CHANGE IN THE CONTROLLING LEGAL PRINCIPLES APPLICABLE TO

IMPORT-EXPORT CLAUSE CASES ENUNCIATED IN AN INTERVENING DECISION OF THIS COURT.

PARTIES

The petitioner in this action is Joanne Limbach in her capacity as Tax Commissioner of Ohio. She is the successor to Edgar L. Lindley who in his capacity as Tax Commissioner of Ohio was a party to the proceedings below. The respondent is The Hooven & Allison Company.

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DECISIONS BELOW

The Decision of the Ohio Supreme Court is reported at *Hooven & Allison Company v. Lindley*, 4 Ohio St. 3d 169, 447 N.E. 2d 1295 (1983). (Pet. App. A—2). The Decision and Order of the Ohio Board of Tax Appeals is unreported. (Pet. App. A—10).

JURISDICTION

The Decision of the Ohio Supreme Court was entered as its judgment on April 20, 1983. (Pet. App. A–2). The Petition for Certiorari was filed on July 15, 1983, and was granted on October 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article I, § 10, cl. 2 of the United States Constitution, and Ohio Revised Code (R.C.) sections 5709.01, 5711.01 (A) and 5711.16

Article I, § 10, cl.2 of the United States Constitution:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

R.C. § 5709.01:

> All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state, and all domestic animals kept in this state and not used in agriculture, except unmanufactured tobacco which shall be exempt from taxation for state purposes to the extent of the value, or amounts, of any unpaid nonrecourse loan or loans thereon granted by the United States government or any agency thereof, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as

personal property and belonging to persons residing in this state and not used in in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, are subject to taxation. All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property.

R.C. § 5711.01 (A):

(A) "Taxable property" includes all the kinds of property, except real property mentioned in section 5709.01 and 5709.02 of the Revised Code, and also the amount or value as of the date of conversion of all taxable property converted into bonds or other securities not taxed on or after the first day of November in the year preceding deposits after the date of which deposits are required to be listed in such year, except in the usual course of the taxpayer's business, to the extent he may hold or control such bonds, securities, or deposits on such day, without deduction for indebtedness created in the purchase of such bonds or securities from his credits; but taxable property does not include such investments and deposits as are taxable at the source as provided in sections 5725.01 to 5725.26 of the Revised Code, nor surrender values under policies of insurance.

R.C. § 5711.16:

A person who purchases, receives, or holds personal property for purpose of adding to its value by manufacturing, refining, rectifying, or combining different materials with a view of making a gain or profit by so doing is a manufacturer. When such person is required to return a statement of the amount of his personal property used in business, he shall include the average value, estimated as provided in this section, of all articles purchased, received, or otherwise held for the purpose of being used, in whole or in part, in manufacturing, combining, rectifying, or refining, and of all articles which were at any time by him manufactured or changed in any way, either by combining, rectifying, refining or adding thereto, which he has on hand during the year ending on the day such property is listed for taxation annually, or on the part of the year during which he was engaged in business. He shall separately list finished products not kept or stored at the place of manufacture or at a warehouse in the same county.

The average value of such property shall be ascertained by taking the value of all property subject to be listed on the average basis, owned by such manufacturer on the last business day of each month the manufacturer was engaged in business during the year. The result shall be the average value to be listed. A manufacturer shall also list all engines and machinery, and tools and implements, of every kind used, or designed to be used, in refining and manufacturing, and owned or used by such manufacturer.

STATEMENT OF THE CASE

Petitioner, the Tax Commissioner of Ohio, assessed ad valorem personal property taxes under R.C. Chapter 5711 against certain raw materials imported by respondent, The Hooven & Allison Co., from various foreign countries and retained in their original packages by respondent in its warehouse in Ohio for their intended use by respondent in the manufacture of cordage.

In its Inter-County Corporation Returns of Taxable Property for return years 1976 and 1977, respondent had deducted imported raw materials retained in their original packages from its manufacturing inventory, giving the following explanation:

> The inventories represent fibres imported by the taxpayer from foreign countries, held in the original packages in its warehouse in Xenia prior to being used in manufacturing cordage, and when they are removed therefrom or placed in the production line in the factory, such imported fibres so used, or removed from the original package, are thereupon transferred to the Goods in Process, and are included in the taxable inventories in Xenia City.

Subsequent to the assessment, respondent filed an application for review and redetermination of the assessment, arguing that the Import-Export Clause of the United States Constitution precludes, and the decision of this Court in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) (hereinafter *Hooven I*) collaterally estops, the Tax Commissioner from levying Ohio's ad valorem personal property taxes upon the subject imported raw materials. In the

Certificate of Determination affirming the assessment, the Tax Commissioner rejected respondent's arguments on the basis of this Court's decision in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). The Certification of Determination is set forth in full in the Decision and Order of the Board of Tax Appeals (Pet. App.A-11.)

Respondent appealed to the Ohio Board of Tax Appeals from the Tax Commissioner's Certificate of Determination specifying the following errors, *inter alia*, in its notice of appeal:

> 2. The Commissioner erroneously determined that the State of Ohio was not collaterally estopped by the United States Supreme Court decision in *The Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) from assessing the Appellant's imported raw materials inventory retained in its original packages on tax-listing date.
>
> 3. The Commissioner erroneously determined that the levying of Ohio's personal property tax upon Appellant's imported raw materials inventory retained in its original packages on tax-listing date does not impair the federal government's regulation of foreign trade in contravention of the "Import-Export" clause, or of the Commerce clause of the United States Constitution.

The Board of Tax Appeals held that the Tax Commissioner was collaterally estopped by the decision of this Court in *Hooven I*. Although the Tax Commissioner, relying on this Court's decision in *Commissioner v. Sunnen*, 333 U.S. 591 (1948), argued before the Board of Tax Appeals that collateral estoppel was inapplicable because the legal principles upon which *Hooven I* was based had been abandoned by the decision of this Court in *Michelin Tire Corp. v. Wages, supra*, the Board's de-

cision contained no reference to that decision or its effect on the application of collateral estoppel based on *Hooven I*. The Board of Tax Appeals did not consider the constitutional issues raised by respondent, stating that it lacked jurisdiction to determine those issues. (Pet. App. A-10).

Respondent filed a notice of appeal from this decision to the Ohio Supreme Court to secure a determination on its constitutional claims. The Tax Commissioner filed a notice of appeal from the decision to the Ohio Supreme Court, specifying the following error:

> The Board erred in holding that the Tax Commissioner is collaterally estopped by the decision of the United States Supreme Court in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945), from assessing the personal property tax for the tax years 1976 and 1977 on taxpayer's imported raw materials inventory retained in its original packages on tax listing day and, based on such holdings, deciding that the final determination of the Tax Commissioner in issue in BTA Case Nos. 79-C-637 and 79-C-638 should be reversed.

The Tax Commissioner argued before the Ohio Supreme Court that this Court's decision in *Michelin* so changed the legal principles controlling in Import-Export Clause cases as to render the doctrine of collateral estoppel inapplicable, relying on this Court's decision in *Commissioner v. Sunnen, supra*.

The Ohio Supreme Court rejected the Tax Commissioner's argument that collateral estoppel was inapplicable because *Michelin* had repudiated the "original package" doctrine upon which *Hooven I* was based and affirmed the decision of the Board of Tax Appeals that the Tax

Commissioner was collaterally estopped from assessing respondent's imported raw materials. Having held that the Tax Commissioner was barred by the doctrine of collateral estoppel from levying Ohio's ad valorem personal property tax on respondent's imported raw materials, the Ohio Supreme Court declined to address the constitutional issues raised by respondent in its appeal. (Pet. App. A-2).

SUMMARY OF ARGUMENT

I. In *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), this Court held that a state nondiscriminatory ad valorem personal property tax was not the type of exaction which the Framers of the Constitution considered as being an "impost" or "duty" and that such a tax was therefore not within the prohibition of Article I, section 10, clause 2 of the Constitution of the United States, the Import-Export Clause, against the laying of "any Imposts or Duties on Imports." This holding was based upon this Court's exhaustive historical analysis of the Import-Export Clause and its conclusion that the imposition of a nondiscriminatory ad valorem property tax on imported goods would not offend any of the three objectives of the Import-Export Clause.

Michelin adopted a fundamentally different approach to Import-Export Clause cases. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 752. Specifically abandoned was the concept that the Import-Export Clause constituted a broad prohibition against all forms of state taxation which fell on imports. *Michelin Tire Corp. v. Wages*, *supra*, at 290-291. Until *Michelin*, this concept had been applied to prohibit any state tax on goods imported until those goods had lost their status as imports. The primary doctrine that was formalized to determine when goods had lost their status was the "original package" doctrine. For over a century after the enunciation of this doctrine in *Low v. Austin*, 13 Wall. 29 (1872), it was the basic legal principle applied in Import-Export Clause cases to determine whether state exactions on imported goods were constitutionally permitted.

Michelin expressly overruled *Low v. Austin*, *supra*, and rejected the controlling legal principle upon which *Low* was based, the "original package" doctrine. This rejection

of the controlling legal principle of *Low* also overruled in principle all of the cases decided subsequent to *Low v. Austin* which were based on that controlling legal principle. *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) (*Hooven I*) was among those cases which were decided on the basis of the "original package" doctrine formalized in *Low v. Austin*, and therefore retains no vitality subsequent to *Michelin*.

The narrow reading and application of *Michelin* by the Ohio Supreme Court in the decision below ignored the historic nature of the *Michelin* Court's abandonment of the century-old "original package" doctrine. *Michelin* changed the entire focus of Import-Export Clause cases from the nature of the goods as imports to the nature of the tax at issue. Subsequent to *Michelin*, the determinative question in Import-Export Clause cases is no longer whether the goods have lost their status as imports but rather whether the tax sought to be imposed was an "impost" or "duty."

Hooven I held that a nondiscriminatory state ad valorem personal property tax could not be imposed within the strictures of the Import-Export Clause until such goods lost their status as imports by being removed from their original packages. Clearly, this holding is in direct conflict with *Michelin's* holding that such a tax was not an "impost" or "duty" and was therefore not prohibited by the Import-Export Clause regardless of whether the goods upon which such tax was levied had lost their status as imports. Because of this direct conflict between *Michelin* and *Hooven I*, the latter case has unquestionably been overruled in principle by *Michelin* and the Ohio Supreme Court's finding that *Hooven I* remains currently valid was clearly erroneous.

Affirmance of the decision below would effect a resurrection of the "original package" doctrine and would result in preferential treatment being accorded to manufacturers

who use imported rather than domestic raw materials. It will allow such manufacturers to avoid paying their fair share for the services provided by the state and require local taxpayers to subsidize those services provided to those manufacturers. *Michelin* expressly stated that the Import-Export Clause could not be read in such a manner as to allow such preferential treatment.

II. At the very least, *Michelin* effected a change in the controlling legal principle upon which *Hooven I* was based, the "original package" doctrine, and under this Court's decision in *Commissioner v. Sunnen*, 333 U.S. 591 (1948), *Hooven I* was no longer conclusive and the doctrine of collateral estoppel was rendered inapplicable. In *Sunnen*, this Court held that collateral estoppel is not applicable where there has been a modification or change in the controlling legal principles effected by an intervening decision of this Court. This limitation on the applicability of collateral estoppel is particularly compelling in the instant case because *Michelin* did more than modify or change the "original package" doctrine, it specifically repudiated that doctrine.

In its decision below, the Ohio Supreme Court failed to properly apply this Court's decision in *Sunnen*, even though it apparently recognized that *Michelin* had repudiated the "original package" doctrine. This failure to follow the dictates of *Sunnen* will lead to the very tax inequality which *Sunnen's* admonitions were designed to avoid. Hooven & Allison Company will be forever immune from taxation on its imported goods because of a decision based upon a now repudiated legal doctrine while all other taxpayers' liability will be determined upon the basis of the fundamentally different approach adopted by *Michelin*. Such a result should not be countenanced by this Court.

ARGUMENT

I. Ohio's Assessment of its Nondiscriminatory Ad Valorem Property Tax Against Imported Goods No Longer in Transit and Held in Ohio for Use in Manufacture Is Not Within the Prohibition of the Import-Export Clause Against the Laying by States of "any Imposts or Duties on Imports."

In 1976, this Court issued an historic decision, *Michelin Tire Corp. v. Wages*, 423 U.S. 276, which repudiated a century-old doctrine, the "original package" doctrine, and completely changed the legal analysis to be applied in Import-Export Clause cases. *Michelin* held that the Import-Export Clause prohibited only the imposition of "Imposts and Duties on Imports" and that a state nondiscriminatory ad valorem property tax was not such an exaction and was not therefore prohibited by the Import-Export Clause.

The decision of the Ohio Supreme Court that the Tax Commissioner of Ohio was collaterally estopped from assessing Ohio's ad valorem property tax against respondent's imported raw materials was apparently based upon its holding that the decision of this Court in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945)(Hooven I), in which such goods were held to be immune from that tax under the "original package" doctrine, was of continued vitality subsequent to this Court's decision in *Michelin*. That holding is in direct conflict with the *Michelin* decision.

For over a century following this Court's decision in *Low v. Austin*, 13 Wall. 29 (1872), wherein the "original package "doctrine was spawned, the Import-Export Clause was viewed as a broad prohibition against all taxes on imports. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 752 (1978); P. Hartman, *Federal Limitations on State and Local Taxation* § 5:2, at 192-193, § 5:4, at 199; W. Hellerstein, *State*

Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?, 75 Mich. L. Rev. 1426 (1977). The primary consideration in such cases was whether the challenged tax reached imports; the question to be decided was whether the goods had lost their status as imports. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos., supra*, at 752, 760. Until *Michelin*, imported goods retained their status as imports so long as they remained in their original packages, and as imports they were considered to be immune from all forms of state taxation under the Import-Export Clause.

In *Michelin*, this Court expressly overruled *Low v. Austin, supra*, and abandoned the century-old "original package" doctrine along with the concept that the Import-Export Clause constituted a broad prohibition against all forms of state taxation which fall upon imports. 423 U.S., at 279, 290 and 301; *Washington Revenue Dept. v. Association of Washington Stevedoring Cos., supra*, at 760; P. Hartman, *supra*, § 5:4 at 198-199; W. Hellerstein, *supra*, at 1429-1430.

This abandonment constituted an historic break from the controlling legal principles upon which the determinations regarding the application of the Import-Export Clause had been based. *Michelin* adopted a fundamentally different approach to Import-Export Clause cases. Rather than looking at whether the goods had lost their status as imports, the Court focused upon the nature of the tax being challenged to ascertain whether it was an "Impost or Duty" forbidden by the Import-Export Clause. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos., supra*, at 752; P. Hartman, *supra*, at § 5:4, at 198-199; W. Hellerstein, *supra*, at 1429-1430.

The *Michelin* Court looked to the purposes behind the inclusion of the Import-Export Clause in the Constitution

and determined that nondiscriminatory state ad valorem property taxes were not the type of exactions the Framers of the Constitution considered as creating the three main concerns or evils the clause was intended to eliminate:

> Our independent study persuades us that a nondiscriminatory ad valorem property tax is not the type of state exaction which the Framers of the Constitution or the Court in *Brown* had in mind as being an "impost" or "duty" and that *Low v. Austin's* reliance upon the *Brown* dictum to reach the contrary conclusion was misplaced.
>
> 423 U.S., at 283.

The *Michelin* Court's overruling of *Low v. Austin, supra,* was based upon a cogent historical analysis of the original purpose and scope of the Import-Export Clause. This analysis focused on whether a nondiscriminatory ad valorem property tax would impair any of the three main objectives of the Framers:

> [T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the inland States not situated as favorably geographically.
>
> 423 U.S., at 285-286.
> (footnotes omitted)

Determining that such a tax would offend none of these objectives, the Court concluded that "[n]othing in the history of the Import-Export Clause even remotely suggests that a nondiscriminatory ad valorem property tax which is also imposed on imported goods that are no longer in import transit was the type of exaction that was regarded as objectionable by the Framers of the Constitution." *Id.*, at 286. Having held that the prohibition of the Import-Export Clause was only against the laying of "Imposts or Duties," and that a nondiscriminatory state ad valorem property tax was not such an exaction, the Court held that irrespective of whether the tires had lost their status as imports, Georgia's assessment of its nondiscriminatory ad valorem property tax against the imported tires was not prohibited by the Import-Export Clause.

Although the *Michelin* Court expressly overruled only *Low v. Austin*, which it considered to be the leading decision applying the "original package" doctrine (423 U.S. at 282), its decision implicitly overruled all of the cases decided subsequent to *Low v. Austin* which applied the rationale of that case and unquestionably changed the controlling legal principles applicable in Import-Export Clause cases. Among such cases applying the "original package" analysis of *Low v. Austin* was *Hooven I.* This is clearly evidenced by a review of the following statement in *Hooven I.*:

> Although one Justice dissented in *Brown v. Maryland, supra,* from that day to this, this Court has held, without a dissenting voice, that things imported are imports entitled to the immunity conferred by the Constitution; that that immunity survives their arrival in this country and continues until they are sold, removed from the original package, or put to the use for which they are imported. *Waring v. The Mayor,*

supra, 122-123; *Low v. Austin*, 13 Wall. 29, 32-33; *Cook v. Pennsylvania*, 97 U.S. 566, 573; *May v. New Orleans*, 178 U.S. 496, 501, 507-508; *Burke v. Wells*, 208 U.S. 14, 21-22, 24; *Gulf Fisheries Co. v. McInerney*, 276 U.S. 124, 126-127; *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 423.

324 U.S., at 657.

While it is true that *Hooven I* relied on language in *Brown v. Maryland*, 12 Wheat. 419 (1827), a review of *Low* and *Hooven I* reveals that both decisions relied on the same language of *Brown*. The following language from *Brown* was relied on by *Low* (13 Wall., at 33) and by *Hooven I* (324 U.S., at 657 and 665):

> [B]ut while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution.
>
> 12 Wheat., at 442.

Both *Low* (13 Wall., at 34) and *Hooven I* (324 U.S., at 666) also quoted and relied on the following language from *The License Cases*, 5 How. 504, 575 (1847):

> Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the state usually taxed for the support of the state government.

Low and *Hooven I* both read the above language from *Brown* and *The License Cases* as prohibiting a tax in any form on imported goods held in their original package. Therefore, if *Low* had misread the opinions in *Brown* and *The License Cases*, as the *Michelin* Court expressly found

(423 U.S., at 282-283 and 299-301) so did *Hooven I*, and its holding based thereon is no more currently valid than the expressly overruled decision in *Low*.

However, in its decision below, the Ohio Supreme Court held that *Michelin* had neither implicitly overruled *Hooven I* nor altered the legal principles upon which that decision was based. The Court expressly found that *Hooven I* retained its vitality even subsequent to *Michelin* and, based on that finding, rejected the Tax Commissioner's argument based on *Commissioner v. Sunnen*, 333 U.S. 591 (1948), that *Michelin* eviscerated the collateral estoppel effect of *Hooven I*. The Ohio Supreme Court's reasoning in its attempt to distinguish *Michelin* and *Hooven I* reveals the Court's basic misunderstanding of this Court's decision in *Michelin*. The Ohio Supreme Court distinguished the two cases based on the factual distinctiveness of the goods involved and their status as imports and the language regarding *Hooven I* contained in this Court's decision in *Youngstown Sheet & Tube Co. v. Bowers*, and *United States Plywood Corp. v. Algoma*, 358 U.S. 534 (1959), a decision which was rendered prior to *Michelin* and which was based upon the "current operational needs" doctrine which was merely another test formalized to determine whether the goods at issue had lost their status as imports.

This attempt to distinguish *Michelin* because it involved imported goods held for resale is inconsistent with the holding in *Hooven I* that whether the imported goods were held for resale or for use in manufacturing was not relevant to a determination of their immunity from taxation under the Import-Export Clause. 324 U.S., at 667-668. The reasoning of the Ohio Supreme Court in its decision below is particularly curious when viewed from the perspective of the history of *Hooven I*. In its consideration of the applicability of the Import-Export Clause in *Hooven I* (142 Ohio St. 235, 51 N.E. 2d 723 (1943)), that

Court held that the "original package" rule applied only to imports held for resale and not to imported goods held for use in manufacturing and upheld the imposition of Ohio's ad valorem property tax on such goods.

This Court rejected this distinction, stating that "we see no practical reason for abandoning the test [original package] which has been applied for more than a century, or why, if we are to retain it in the case of imports for sale, we should reject it in the case of imports for manufacture." 324 U.S., at 668.

More importantly, the Ohio Supreme Court's attempt to distinguish the two cases ignores the fundamentally different approach to Import-Export Clause cases initiated by this Court in *Michelin*. Whether the goods had lost their status as imports was the specific inquiry abandoned by *Michelin*; the Court expressly refrained from addressing that question because the relevant inquiry was no longer the nature of the goods but the nature of the tax at issue. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, *supra*, at 752, 760.

Professor Walter Hellerstein, author of numerous articles concerning constitutional limitations on state taxation, also recognized the significance of *Michelin*:

> [B]ut its opinion in *Michelin* marks a fundamental reexamination of the purpose and scope of the import-export clause's prohibition against state taxation of imports. In contrast to its past decisions in this area, which were often characterized by a mechanistic application of Marshall's "original package" language in *Brown v. Maryland* to determine whether the goods under consideration had ceased to be "imports"[31] the Court's opinion explicitly refrained from addressing the question whether Michelin's tires had lost their status as imports. Rather, the court focused upon

the nature of the exaction at issue, to ascertain whether it constituted a forbidden "impost" or "duty."

[31] *See*, *e.g.*, *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 664-665 (1945).

W. Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 Mich. L. Rev. 1426 at 1429-1430 (1977).

Under "the central holding of *Michelin* that the absolute ban is only of 'Imposts or Duties' and not of all taxes," *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, *supra*, at 759, the relevant inquiry is whether the tax at issue constitutes a prohibited "Impost" or "Duty." If the challenged tax is determined not to be an "Impost" or "Duty," it will not offend the Import-Export Clause even if the goods have not lost their status as imports.

Therefore, *Hooven I* may properly be distinguished from *Michelin* only if the nature of the taxes at issue in the two cases differed. In *Michelin*, this Court held that a nondiscriminatory state ad valorem property tax was not an "Impost" or "Duty" and therefore was not barred by the Import-Export Clause. 423 U.S., at 283. In *Hooven I*, the Court held that a nondiscriminatory state ad valorem property tax could not be assessed against imported goods so long as those goods retained their status as imports. It cannot be disputed that the taxes at issue in *Michelin* and *Hooven I* were of the very same type. The only relevant distinction between the two cases is the fact that *Hooven I* invoked the "original package" doctrine of *Low v. Austin* in holding that Ohio could not levy its nondiscriminatory ad valorem property tax upon imported goods until they lost their status as imports and that this Court repudiated

the "original package" doctrine in *Michelin*. However, rather than supporting the Ohio Supreme Court's finding that *Hooven I* is of continued vitality, this distinction conclusively establishes that *Hooven I* retains no more validity than did the decision formalizing the "original package" doctrine, *Low v. Austin*, which was expressly overruled in *Michelin*.

The Ohio Supreme Court's holding below that petitioner was collaterally estopped by *Hooven I* from assessing Ohio's nondiscriminatory ad valorem personal property tax against respondent's imported raw materials held for use in manufacture necessarily adopted the legal principle upon which *Hooven I* was based, the "original package" doctrine. Because the opinion below resurrects the "original package" doctrine expressly repudiated in *Michelin*, it is in direct conflict with *Michelin*. This attempt to resurrect the "original package" doctrine after its burial in *Michelin* must be rejected, just as this Court rejected such an attempt in *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, *supra*, at 760.

There is no logical or legal justification which would support a retention of the "original package" doctrine in cases involving imported manufacturing inventory while applying the fundamentally different analysis of *Michelin* in cases involving imported goods held for resale. The reasoning underlying *Michelin*'s abandoment of the "original package" doctrine is just as compelling with respect to imported manufacturing inventory as it is to imported goods held for resale. If a nondiscriminatory ad valorem property tax is not an "impost" or "duty," as *Michelin* specifically held, it is not within the strictures of the Import-Export Clause regardless of the type of imported goods upon which it is sought to be imposed.

Furthermore, to allow manufacturers who use imported raw materials to retain their immunity under the "original

package" doctrine and thus avoid contributing their share of the state's cost of providing its various services to all those within its borders would accord such manufacturers preferential treatment resulting in an unfair competitive advantage over manufacturers who use domestic raw materials. The *Michelin* Court held that the Import-Export Clause could not be read to allow such an unjust result:

> The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods, but it cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies.
>
> 423 U.S., at 287.

Simply stated, the Import-Export Clause prohibits state exactions discriminating against imports by reason of their origin, but it was not intended to provide a commercial advantage to those using imported goods by immunizing those goods from a state nondiscriminatory ad valorem property tax.

II *Michelin Tire Corp. v. Wages* Repudiated the Legal Principle upon Which *Hooven I* was Based, Thereby Rendering the Doctrine of Collateral Estoppel Inapplicable to the Tax Assessment at Issue.

In its decision holding that the Tax Commissioner of Ohio was collaterally estopped by *Hooven I* from assessing respondent's imported raw materials held for use in manufacture, the Ohio Supreme Court failed to properly apply this Court's decision in *Commissioner v. Sunnen*, 333 U.S. 591 (1948).

In *Sunnen*, this Court detailed at length the limitations on the applicability of the doctrine of collateral estoppel

in tax litigation and the rationale for such limitations.

But collateral estoppel is a doctrine capable of being applied so as to avoid an undue disparity in the impact of income tax liability. A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter. But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes. If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion. (citation omitted) Such consequences, however, are neither necessitated nor justified by the principle of collateral estoppel. That principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.

And so where two cases involve income taxes in different taxable years, collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice. *It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged.*

333 U.S., at 599-600.
(Emphasis supplied)

The Court noted that a decision of this Court intervening between the two proceedings "may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable." *Id.*, at 600.

The rationale for such a limitation on the application of collateral estoppel is obvious and compelling. The effect of applying the doctrine where there has been a change in the controlling legal principles would be to petrify the law as to taxpayers who won or lost on the basis of antiquated and rejected legal principles while the liability of taxpayers who had not sought legal redress would be determined on the basis of the current legal principles. *Id.*, at 599; *Montana v. United States*, 440 U.S. 147, 161 (1979); 1B *Moore's Federal Practice* § 0.422 at 3402, § 0.422[5] at 3451. Such disparate treatment of taxpayers in the same class would result in basic tax inequality, a result which cannot justly be allowed by blind reliance on the doctrine of collateral estoppel.

The limitation on the doctrine of collateral estoppel espoused in *Sunnen* is particularly applicable in this case. Although the opinion below does not clearly and definitively articulate the precise reason for not limiting the application of collateral estoppel[1], the effect of the deci-

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[1] As an example, while the Ohio Supreme Court apparently acknowledged that *Michelin* repudiated the "original package" doctrine, at n.1 of its Opinion (Pet. App. A-6), which indicates that it recognized that *Michelin* had changed the controlling legal principles in Import-Export Clause cases, its finding that *Hooven I* was of continued vitality subsequent to *Michelin* runs counter to that indication.

sion is clear. It will result in "inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion," the avoidance of which was the fundamental reason for the limitation on the doctrine of collateral estoppel enunciated in *Sunnen*, 333 U.S. at 599.

If left standing, the Ohio Supreme Court's decision barring the Tax Commissioner from assessing Ohio's nondiscriminatory ad valorem property tax against respondent's imported raw materials will result in respondent avoiding forever the tax on its imported raw materials inventory because of a prior decision, *Hooven I*, which was based on a now repudiated legal principle, the "original package" doctrine, while all other taxpayers would be subject to that tax on their imported raw materials inventory under the fundamentally different legal principles enunciated in *Michelin*[2]. Respondent alone would be perpetually immune from such taxation, while all other taxpayers would subsidize the services and benefits provided by Ohio to this one taxpayer. Respondent would be accorded a distinct competitive advantage over other manufacturers, a result directly contrary to the admonition in *Sunnen* that collateral estoppel is not to be blindly applied where, because of an intervening change in the controlling legal principles, to do so would cause tax inequality.

Because application of the doctrine of collateral estoppel based on *Hooven I* would result in a discriminatory application of the tax laws, the Ohio Supreme Court should have followed this Court's decision in *Sunnen* and held that

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[2] Petitioner's argument that *Michelin* changed the controlling legal principle upon which *Hooven I* was decided, the "original package" doctrine, is fully addressed in the immediately preceding part of this Brief.

Hooven I was no longer conclusive as a result of *Michelin's* repudiation of the "original package" doctrine, the legal principle upon which *Hooven I* was based.

CONCLUSION

For the reasons set forth in the foregoing brief, the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief for the Petitioner have been served on the respondent by forwarding such copies to Michael A. Nims, Kenneth E. Updegraft, Jr., and Charles H. Mollenberg, Jr., Jones, Day, Reavis & Pogue, 1700 Union Commerce Building, Cleveland, Ohio 44115, counsel for respondent, by United States mail, postpaid, this 16th day of November, 1983. I further certify that all parties required to be served have been served.

RICHARD C. FARRIN
Assistant Attorney General